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IN THE

Supreme Court of the United States

No. 354

STANLEY HOWITT, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, APPEARING AS AMICUS CURIAE.

WILLARD H. McEWEN,
741 Nicholas Bldg., Toledo 4, Ohio,

JAMES L. CRAWFORD,
1015 Vine St., Cincinnati 2, Ohio,

Attorneys for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

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NATURE OF THE CASE

This case arises out of criminal indictments wherein the petitioners were accused of violating certain provisions of the Interstate Commerce Act. They were charged with having exacted fees in exchange for the securing of coach seat and sleeping car reservations for persons desiring to leave the City of Miami, Florida. The trial resulted in a judgment of conviction. An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment was affirmed. As we understand it, the petition for *certiorari* in this Court is predicated on the

legal proposition that the sections of the Interstate Commerce Act relied upon by the United States to support a conviction are directed to carriers and persons acting in their behalf, and not to persons, like the petitioners, acting in their own independent interest.

ISSUE HERE CONSIDERED

We are not so much concerned with a consideration of the principal issue in the case, which has been fully briefed by petitioners' counsel, as by another, which appears to be indirectly involved. Specifically, our concern is caused by a portion of the instructions of the District Court to the jury, reading as follows:

> "The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services, than the rates specified in the tariffs filed with the Interstate Commerce Commission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violation may be committed. Whether this is done by the exaction of additional fees by compulsion, *or by way of gratuity or tips*, or by any other device is of no materiality to the commission of the offense, if the compulsion, *or tip*, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater

> compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission." (Emphasis supplied.)

The above quoted language is susceptible to two interpretations. If the District Court meant to say that so long as an unlawful charge is established it is of no consequence that it is made to assume the guise of a tip or gratuity, then we have no quarrel with this statement. If, however, the words used can be construed as meaning that any tip or gratuity of whatever nature is unlawful if a passenger thereby pays out something in addition to the carrier's stated charge, then we disagree. Inasmuch as a bona fide tip always represents an additional payment in so far as the passenger is concerned, it follows that this interpretation of the act would prohibit railroad clerks generally from accepting tips, however innocent the intent of the parties might be, and the holiday box of cigars, or the "keep the change" gesture, would make the clerk criminally liable if he accepted.

We submit that under no proper interpretation of the Interstate Commerce Act can such a result be attained. We do not believe that the District Court meant to state any such doctrine of law, but inasmuch as the conclusion last mentioned can in fact be drawn from the language used, we feel that it is desirable for this Court to clarify the law in this regard, in the course of its proceedings in this case. Accordingly, this brief is devoted to establishing the proposition that a bona fide tip paid by a passenger to a railroad clerk securing traveling accommodations for such passenger cannot be considered as a violation of any provision of the Interstate Commerce Act.

ARGUMENT

Statutory Provisions Involved. The indictments underlying this action are predicated on the terms of Section 1 (5), Section 2, Section 3, and Section 6 (7), of the Interstate Commerce Act. Each of these sections (except Section 3) refers to "rates," "fares," "charges," or "compensation," and prohibits such of these as are unjust, unequal, or in excess of published tariffs. Section 3 of the Act refers to and prohibits the giving of "any undue or unreasonable preference or advantage" to any person. Obviously the mere giving and receiving of a bona fide tip could not, without more, constitute the giving of any such preference or advantage, so that this section is not a subject for consideration in this brief. Considering the language of the remaining sections, the question is that of whether such bona fide tip can constitute a "charge" or an item of "compensation" within the meaning of these and synonymous terms as used in the statute.

In developing our position, we will point out, first, the nature of a "charge,"* as that term is used in the Interstate Commerce Act, and second, the fundamental distinction between a charge and a bona fide tip.

What is a Charge? The word "charge" is one which has many meanings in the law. As used in connection with the practices of carriers, it clearly refers to an exaction made of the passenger or shipper as the result of a legal obligation or as a necessary prerequisite

*The words "rate," "fare," "charge," and "compensation," are all used in the various sections of the statute. No distinction in meaning appears to have been intended. The Interstate Commerce Commission has said: "'Rate,' 'fare' and 'charge,' broadly speaking, denote the compensation of the carrier." *Stopping of Cars in Transit to Complete Loading*, 37 I. C. C. 130, 132. We have used the single term "charge" in discussing this problem as being apparently the one most generally referred to in the cases.

to the rendition of the carrier's services. The word does not appear to be one to which the courts have given recent consideration, and in fact very few cases, old or new, have attempted to define it, presumably because its meaning was considered to be clear. The case of *Ballou vs. Hawaiian Tramways Inc.*, 10 Haw. 376, interpreted a local statute limiting the "charges" of certain carriers, and in an action brought under the statute, the court stated, in reference to the meaning of this word:

> "The essence of the meaning is that it is something required, exacted or taken from the traveler, as compensation for the services rendered."

In another case arising under the Interstate Commerce Act, Section 1 (5), the United States Circuit Court of Appeals for the Sixth Circuit, stated the following definition of the word "charges" in the course of its opinion:

> "This language, * * unquestionably uses the word 'charges' in the technical sense of segregated items of expense or dues, which are to be demanded by the carrier for any service in connection with transportation * *." (*Detroit, G. H. & M. vs. Interstate Commerce Commission*, 74 Fed. 803; affirmed 167 U. S. 633.)

The above two cases are the only ones which we have been able to discover which deal with this specific point. The conclusions reached, however, are so obviously in accord with the normal usage of language, that they may be relied upon as authoritative support for the proposition that a charge, properly so-called for the purposes of the Interstate Commerce Act, is an exaction, made by the party rendering some transportation service, which is of such a nature that if not paid, the service itself will not be rendered.

Distinction Between a Charge and a Tip. While the term "charge" is thus shown to connote an enforced payment, a tip is quite different. It essentially is a voluntary payment, given as a token of appreciation of services well performed. The fact that social usage has established that certain types of service always justify and almost require the giving of such tokens, does not change the essential nature of the tip itself. It may be withheld entirely, or varied in amount, according to the inclination of the donor, without legal liability.

The word "tip" is defined in the New International Dictionary as "a small gift of money, especially one to a servant or employee of someone else for a service done."

The legal status of tips has been considered in a number of cases. Generally, however, the issue involved has been that of whether they should be included in wages as computed in reference to various statutory provisions. See the case of *Williams vs. Jacksonville Terminal Company*, 315 U. S. 386, 404, for a summary statement of various statutes and the rulings which have been made thereunder. It has seldom been necessary to differentiate between a tip and a charge. Such a differentiation was made, however, in the case of *Restaurants and Patisseries Longchamps, Inc., vs. Pedrick*, 52 Fed. Supp. 174. This action was brought to recover sums alleged to have been wrongfully collected as employment taxes under the Federal Insurance Contributions Act. It appears from the opinion that the plaintiff operated a chain of restaurants and inaugurated the practice of abolishing all tipping in its establishments. As a substitute, it made provision for a regular service charge of ten per cent, to be added to each check. The proceeds of these service charges were paid to the employer, and the amount so collected was later apportioned among the employees. The plaintiff contended that these amounts were tips, but the court ruled to the contrary, saying:

"The word 'tip' is defined in Funk & Wagnalls' New Standard Dictionary as 'a sum of money given, as to a servant usually to secure better or more prompt service.' This connotes a voluntary act. A patron in a restaurant is under no compulsion to leave a 'tip.' In the instant case the voluntary aspect is completely eliminated. The customer is requested not to do it and the waiter would be subject to discipline if he accepted it.

"Section 402.228 of Regulations 106 provides: 'Tips or gratuities paid directly to an employee by a customer of an employer, and not accounted for by the employee to the employer' are excluded from wages for the purpose of the Federal Insurance Contributions Act.

"It seems clear, therefore, that the service charge in this case does not come within this exemption and constitutes wages for the purpose of the Act." (pages 174-175.)

A similar distinction was recognized in the case of *Harrison vs. Kansas City Terminal Railway Company*, 36 Fed. Supp. 434. This action was brought to collect wages alleged to be due to "red cap" employees under the Fair Labor Standards Act. The defendant had instituted a system whereunder it guaranteed to these workers the receipt of sums equal to the minimum wage provided by the statute, but credited all tips against this guarantee. It was argued that this practice was illegal by virtue of the Interstate Commerce Act because under it the tip would constitute a charge which was unlawful for lack of uniformity by virtue of Section 2 of the Statute. The court rejected this contention, saying:

"The gist of this argument is the erroneous assumption that to require the redcaps to turn in their tips is 'tantamount to making a charge to passengers for redcap service.' But the tips are voluntarily given by the patrons. The redcaps them-

selves do not make a charge. How can that which was not a charge be converted into a charge by the act of turning over the tip?" (page 440.)

It way be fairly concluded from the above authorities that the courts have recognized the existence of a clear line of distinction between a charge and a tip, the distinction being that drawn between a positive exaction and a gratuity, however much the bestowal of the latter may be dictated by social usage. Inasmuch as the Interstate Commerce Act refers to charges, and charges only, in the prohibitions of Section 1 (5), 2 and 6 (7), we submit that there is nothing in the language of this statute which precludes the taking of a bona fide tip by a railroad employee.

General Considerations In addition to the fact that the statutory language does not establish any prohibition of the taking of tips, there is the added fact that such a doctrine of law would lead to results which are essentially inequitable.

Many railroad employees are put in such contact with the public that the practice of tipping has been a natural result. In some instances, these employees are made available for the performance of extra services which are not essential items of transportation, but which some members of the traveling public may desire. In this category red caps and dining car waiters may probably be placed, at least as to most of their services. Other employees, however, perform essential parts of the transportation operation. Pullman cars, for example, could scarcely be operated without the services of porters to prepare berths for night or day use. For these services it has become customary to confer a tip. While extra services may justify an increase in the amount, the basic tip to such employees is distinctly for services within the limits of the carrier's duties. Is it to be held that such basic tips constitute

"charges" over and above those permitted by applicable tariffs and hence that their acceptance is criminal?

The clerk behind the ticket counter is undoubtedly performing an essential part of the transportation business. Frequently customers have numerous or difficult problems of transportation to present to such employees. If their requests are handled with unusual efficiency, they often, though by no means always, express their appreciation by some favor to the clerk with whom they deal. It may be that the passenger hopes thereby to insure for himself similar consideration at some other time or he may have no such future transaction in mind. Almost certainly a refusal of his token of appreciation would be resented. Are we to conclude, however, that such a refusal is required in all cases, if the clerk is to avoid criminal prosecution?

We do not contend that if an unlawful payment is disguised as a tip such disguise should save it from attack. It would be highly improper, however, to condemn all tips as illegal because it might be contended that some have been or could be used to accomplish an improper purpose.

Summary. We do not by the above contentions mean to concede that it has been established that the petitioners have violated any section of the Interstate Commerce Act. As we have above indicated, that point is being presented by petitioners' own counsel. Our purpose here is merely to call to the Court's attention the possible interpretation of the legal principles enunciated by the trial court, principles which might have a far-reaching and damaging effect totally outside the contemplation of the Interstate Commerce Act. In this connection, we have pointed out that there is an essential difference between a charge and a tip, and that the statute could not have intended to forbid the taking of all tips by carrier employees generally or by railroad clerks in particular. Hence, we

submit that this court should hold that bona fide tips are not within the prohibition of the Act.

Respectfully submitted,

WILLARD H. MCEWEN,
741 Nicholas Building,
Toledo 4, Ohio.
JAMES L. CRAWFORD,
1015 Vine Street,
Cincinnati 2, Ohio.
Attorneys for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

SUPREME COURT OF THE UNITED STATES.

No. 354.—October Term, 1945.

Stanley Howitt, Flora Post Lee, James Dewhurst, and Terence P. O'Rourke, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 6, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The wartime transportation shortage during the winter of 1943 made it exceedingly difficult to obtain tickets for trains going north from Miami, Florida. Petitioners are three ticket sellers and one diagram clerk who were employed at that time by a railroad at Miami. Petitioners Howitt, Lee, and Dewhurst were charged with, and convicted for, conspiracy to violate the Interstate Commerce Act, 49 U. S. C. § 1 *et seq.*, in that they conspired to collect and receive unjust and unreasonable charges for passenger transportation in violation of Section 1 (5)[1]; to receive and collect greater compensation for service from certain persons than that which would be collected from others, in violation of Section 2; to prefer particular persons to the disadvantage of others in violation of Section 3 (1); and to collect and receive compensation in excess of that fixed by tariff schedules in violation of Section 6 (7). These violations are made a crime by Section 10[2]. Petitioner O'Rourke was charged with and convicted for committing

[1] Section 1 reads in part as follows:

"Any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person or party, shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing so directed or required to be done in part to be done or to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein shall be deemed guilty of a misdemeanor . . . ."

substantive offenses of the same nature.[2] The Circuit Court of Appeals affirmed. 150 F. 2d 82. We granted certiorari because this case raises important questions concerning the scope of the Act.

The government charged that there was a working agreement between petitioners and certain local hotel employees under which persons anxious to purchase railroad tickets would, in order to obtain them, pay amounts in excess of published rates either to petitioners directly, or to the hotel employees who in turn would divide the excess payments between themselves and petitioners. The railroad played no part in these transactions. The government produced a great deal of evidence to support these charges.[3] Petitioners offered no testimony or other kind of evidence to contradict that produced by the government.[4] Their only contention was raised on demurrer, motion for directed verdict and exception to the charge of the jury. This contention, urged on several different grounds, was that the indictment failed to charge, and

[2] Ordinary violations of the Act are under Section 10 punished only by imposition of a fine. But a proviso imposes a prison term if the violation consists of an unlawful discrimination. Petitioner O'Rourke contends that he was charged only with violating Section 3 (7) rather than Section 2; which is the unlawful discrimination section and that he therefore could not be imprisoned under Section 10. This contention is frivolous. The O'Rourke indictment clearly and explicitly also charges a violation of Section 2.

[3] An amicus brief filed with us contains the suggestion that a rather extensive paragraph of the Court's charge to the jury, to which exception was noted, contains language susceptible of the construction that acceptance of a "bona fide tip" might constitute a violation of the Interstate Commerce Act. We think that that language read in its context does not relate to bona fide tips but rather to excess charges which the prospective passenger was forced to pay and which were made to look like tips. Moreover, this paragraph of the charge also contains instructions that employees acting alone without participation by the railroad might be found guilty of violating the Act. The exception to the paragraph was a general one. In view of what petitioners argue here, what they argued on demurrer, and on the motion for directed verdict, it is likely that the exception was directed to these last mentioned instructions and not to the language challenged by the amicus brief. Indeed, petitioners introduced no evidence to show that they were receiving bona fide tips, nor did they request any charge on the basis of this theory. If petitioners in excepting to the challenged paragraph of the charge had the "bona fide" tip question in mind they should have specifically pointed this out to the trial court. See Allis v. United States, 155 U. S. 117, 121-123. The issue raised by the amicus brief as to whether the Act covers bona fide tips is therefore not before us.

[4] The Circuit Court of Appeals said that this evidence "proved beyond question that the defendants repeatedly and systematically took advantage of the prevailing wartime congestion in transportation to exact from applicants for accommodations more money than the regular rate prescribed and appropriated the difference to themselves."

the evidence failed to establish a crime, since the Interstate Commerce Act and Section 10 in particular are primarily aimed at railroads and do not make discriminatory and illegal charges by railroad employees for passenger transportation criminally punishable, unless the railroad is itself a party to the conduct. This is still the basis of petitioners' arguments.

It is well established that one of the primary aims of the Interstate Commerce Act and the amendments to it was to establish uniform treatment of users of transportation facilities. See *Mitchell v. United States*, 313 U. S. 80, 94, 95. The Act again and again expressly condemns all kinds of discriminatory practices. Railroad employees can accomplish invidious transportation discrimination, whether or not their conduct is approved or participated in by their superiors. Not only do the Act's provisions against discrimination and special favors fail to exempt employees such as petitioners; but section 10 standing alone shows the clearest possible purpose to bar all railroad employees from overcharging for their own or for the railroad's illegitimate gain. The Interstate Commerce Act imposes the same duty on ticket sellers and clerks of common carriers as that imposed on railroad officers or other employees, to treat all the public alike as to the terms and conditions of transportation. Railroad accommodations are thus not to depend upon who will or can pay more because of greater need or a longer purse. See *United States v. Estes*, 6 Fed. 2d 902, 905.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or decision of this case.